

April 22, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Expanding Consumers' Video Navigation Choices (MB. Docket No. 16-42)

Dear Ms. Dortch:

I am firmly opposed to the Federal Communication Commission's (FCC) proposal to "unlock" the set-top box. Although the FCC's end goal is laudable, the roadmap chosen to arrive there is extremely concerning.

Chairman Tom Wheeler's proposed rules ignore a well-settled matter in law and policy. The FCC appointed a Technical Advisory Committee (DSTAC) comprised of industry experts, executives, engineers and watchdogs "to identify, report, and recommend performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system." One path outlined an apps-based approach, while the other outlined a hardware-based approach similar to the erstwhile AllVid proposal. While the DSTAC report did not seem to favor one approach over the other, Chairman Wheeler certainly does.

In the draft proposal, Chairman Wheeler made a deliberate decision to focus on the navigation hardware system and ignore the apps-based approach altogether. The Chairman's choice to favor the hardware approach has definite implications for the market and will usher in major changes – whether those changes benefits consumers or a single company remains to be seen. Reliable studies indicates the proposed rules will have a negligible impact on the retail price of the set-top box.

As I explain in more detail in the attached news articles, I urge the Commission to pause the proceeding until the unknown and unresolved issues in the current proposal can be fully investigated and resolved.

Respectfully Submitted,

Adonis Hoffman, Esq.
Adjunct Professor
Georgetown University
Communication, Culture & Technology
Washington, DC 20057



Out of the (set-top) box and behind the curtain

Adonis Hoffman, February 10, 2016

At first glance, the Federal Communications Commission's (FCC) proposal to open the set-top box market to competition would seem a bold and beneficent nod to consumers and the public interest. But like many policy maneuvers in Washington, nothing is as it first seems, and there is more to this than meets the eye. At stake are billions of dollars in revenue, the reconfiguration of a market and a host of societal issues that go well beyond notions of consumer price or choice, including privacy, data protection, piracy and equal opportunity.

Although I recently served as chief of staff and senior legal adviser to a Democratic FCC commissioner, I admit to being confused by Chairman Tom Wheeler's recent proposal, which appears to be regulatory redux of a well-settled matter in law and policy.

It is clear that Congress directed the FCC to make sure consumers could choose the equipment they use to access pay television. The [STELA \(Satellite Television Extension and Localism Act\) Reauthorization Act](#) put an end to the current set-top box regime, and mandated the agency to develop a new system to spur the retail market for pay TV video navigation devices.

The FCC appointed a [Technical Advisory Committee](#) (DSTAC) comprised of industry experts, executives, engineers and watchdogs "to identify, report, and recommend performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system." The objective was to advance the competitive availability of set-top boxes and television sets in fulfillment of Section 629 of the Communications Act.

After many months and much study, the DSTAC issued a report in August 2015, which outlined several paths forward. One path outlined an apps-based approach to navigation devices, which is favored by cable operators. The other path outlined a hardware approach similar to the erstwhile AllVid proposal, which is favored by companies such as Google and TiVo. While the DSTAC report did not seem to favor one approach over the other, Wheeler's approach certainly does.

And therein lies the problem.

Wheeler has launched a [Notice of Proposed Rulemaking](#) (NPRM) to address these issues. In what promises to be an epic clash of the titans, the battle lines have been drawn: [Big Cable](#) has lined up on one side favoring the apps approach, and [Big Tech](#) (actually Big Alphabet) has lined up on the other side promoting the hardware approach. New members from every quarter of the communications, technology and advocacy communities are being added daily. This scenario conjures up the old African proverb "When the elephants fight, it is the grass that suffers" — a lesson not lost on those of us here on the ground.



So for many consumers, who are seemingly happy with the growing amount of choices being extended by pay TV providers today, including Amazon, Netflix, Roku, Xbox, X1, PlayStation TV and Sling, this is a curious conflict with a dubious intent. It begs the questions: Why this, and why now?

In the draft proposal, Wheeler has made a deliberate decision to focus on the navigation hardware system, and ignore the apps approach altogether. In doing so, he has put a thumb on the regulatory scale. His decision has tremendous implications for the future of this market, and is tantamount to the referee picking the winner of the Super Bowl before the kickoff. The most glaring irony altogether is that everybody would like to see the set-top boxes we all know and loathe go away.

Indeed, there are credible merits to both sides of this argument. The rising price of set-top boxes over the years is a concern for consumers, and giving consumers control over their navigation devices is a laudable policy goal. Yet, there are some glaring inconsistencies and hidden agendas that should see the light of day if we go down the primrose path.

A closer look suggests that the chairman's policy is designed to substitute one set of players for another, or to be more precise, replace today's set-top box with something designed by Google. In one of the finest examples of congressional choreography, Google demonstrated its newest thing for Capitol Hill staff a mere one day after Wheeler's announcement. Critics have decried the timing as more collusion than coincidence, but that might be going too far.

The chairman's choice to favor the hardware approach has definite implications for the market, and indefinite benefits for consumers. And it is this consequence that is most troubling. It appears that the FCC has already greased the skids by allowing one company to help it write the specifications of a system that is supposed to be open to definition. As with other major policy matters, Google has demonstrated an outsized affect and influence on yet another Obama technology policy decision.

If the FCC adopts the Wheeler proposal in a final "Report and Order" later this year, it will usher in major changes with dubious public interest and consumer benefits. It will cede its regulatory and oversight authority on privacy and security. It will embed a regime that creates more, not fewer, hurdles for small players, new entrants and minority content providers to pierce the Silicon Curtain. And according to reliable studies, it will have a negligible impact on the retail price of the set-top box.

When all is said and done, the battle on set-top box policy could reveal several lessons. First, the invisible hand of the free market can be stifled. Second, money matters more and more in public policy. Third, just because something claims to be pro-consumer does not mean it really is.

It is perfectly all right if consumers choose the FCC-Google option at the end of the day. But they should at least know the tradeoffs. While Google has a wonderful suite of indispensable, utilitarian products ranging from Gmail to Chrome to YouTube, it does have a dark side. Anything and everything that comes in contact with Google — especially data — gets stored, tracked, analyzed, leveraged and monetized to favor Google over anyone else. It has become a



black hole for many small businesses who eschew paid search, and it has completely changed the advertising ecosystem not necessarily for the better. That is its business model, and it has been hugely successful with it. So if this is the pro-consumer choice Chairman Wheeler propounds it to be, it is only fair that full disclosure and transparency become the order of the day. Consumers and the public interest demand nothing less.

[Hoffman](#) is chairman of Business in the Public Interest and adjunct professor in Communication, Culture and Technology at Georgetown University. He served at the FCC from 2013 to 2015.



Obama Rex

Adonis Hoffman, April 19, 2016

Roman Emperor Nero Claudius Caesar, according to folklore, sang and played the lyre while Rome was burning in 64 A.D. It is an image that has lived on through the ages, symbolizing a troubled leader dallying during times of immediate crisis. Although President Obama is no Nero, he now can be cited for focusing on little things while a larger, unsecure world looms outside.

History, therefore, may not be so kind to Obama when it reviews his decision to fiddle with regulatory minutiae when there is so much mayhem in the world. Just a few days ago, the President inserted himself into a proceeding at the Federal Communications Commission (FCC) to "open up set top boxes to competition." Moreover, Obama directed every federal agency to report back to him on their programs to promote competition in the marketplace.

Just to be clear, at a time when ISIS is ascendant, when terror is rampant, when North Korea is batty and Russia is flexing, when crime rocks our cities, when the economy is slowing, and when race relations are at their lowest, the president has time to be concerned about America's set-top boxes?

Cable set-top boxes. Really? Come on, man.

The president's action presents a host of troubling issues that are bigger than the act itself.

First, he is interfering in the decision of an independent federal agency, which might be seen as contrary to the separation of powers. Second, he is seeking to influence the commercial market under the banner of advancing competition. Third, and most curiously, doesn't Mr. Obama have more presidential things to do than to worry about the cost of our cable set-top boxes? I mean, isn't there a rogue terrorist, a loose nuke, or a cop-killer on the run? What about America's place in the world, at the very least?

Of course, it is perfectly reasonable and lawful for the President to have a position on a matter of public policy.

The problem comes when he directs a supposedly independent federal agency—the FCC—to deliver a specific outcome. In this instance, it is a position favored by technology darlings who have found regular refuge in the Eisenhower (Old) Executive Office Building under the Obama Administration. It also is a decision with dramatic financial and commercial implications shifting fortunes of multi-billion dollar private industry, where the government has little business regulating. Beyond thumb on the scale, this is tap-dancing on the scale.

"We are a government of laws, not of men" advised John Adams in 1774. Sadly, President Obama has scorned over two hundred years of American tradition by unilaterally dictating a matter rightfully left to the legislative and regulatory process. After all, monarchical



deliberations were eschewed from the beginning of the republic and they have not found favor since.

In a series of executive branch actions, the president decreed that the federal government was now in the business of affirmatively creating competition through its policies. He has directed all federal agencies to report back to him on what measures they are taking to create competition.

While competition is a great and desirable thing, it is best left to the markets and private sector to determine, rather than the federal government. The government's role is to make sure that market forces are not stifling competition; its role is not to artificially create competition through regulation. This is in itself, anti-competitive.

This is not the first time Mr. Obama has veered from his constitutional lane, especially on matters involving our nation's communications services. The president twisted the arm of chairman Tom Wheeler in 2015, forcing him into an about-face on Title II regulation of the internet. Given the seeming popularity of that decision, Obama has now doubled down on his influence over the FCC, all but rubber stamping the FCC's intent to save consumers from set-top box tyranny.

Ironically, both of these decisions have a good chance of being reversed by the U.S. Court of Appeals for the D.C. Circuit or Congress, or both.

Beyond the procedural posturing that may occur over this action, there is a bigger principle at play. At a time when the nation's collective attention is focused on hotly-contested presidential primaries, the president has developed a case of myopia.

He is collecting a lot of little marbles while the big rocks remain.

With a scant nine months left in his presidency, Obama is fiddling with our set-top boxes while the world around him is burning.

[Adonis Hoffman](#) is chairman of Business in the Public Interest and adjunct professor of communication, culture & technology at Georgetown University. He is the author of "[Doing Good](#)—the New Rules of Corporate Responsibility, Conscience and Character."